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No. 83-

In The Supreme Court of the United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; AND MERICAN CURTIS, LTD.,

Petitioners,

v.

CATERPILLAR TRACTOR CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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December 2, 1983

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Where the plaintiffs-petitioners ("plaintiffs") were independent competitors, purchasers of millions of dollars worth of electric generator sets in the United States from an authorized dealer of an electrical generator manufacturer and transported them overseas; where plaintiffs competed in the sale and service of such generator sets with certain of the manufacturer's foreign authorized dealers, primarily the dealer in Saudi Arabia, the market for nearly two-thirds of worldwide exports of the manufacturer's sets; where plaintiffs furnished service to the Saudi Arabian government; where, at the behest of certain authorized dealers, primarily the Saudi Arabian dealer, and after giving assurances that steps would be taken to eliminate such competition, the manufacturer and these dealers allegedly conspired to eliminate plaintiffs' competition in the marketing and servicing of the sets, by means of an innovative restraint; where the princi-

pal step taken was modification of a warranty fee system to transform a fee for service into an automatic penalty amounting to 20% of the margin between the wholesale and retail price of the generator sets, imposed upon plaintiffs' supplier when plaintiffs transferred the sets in United States foreign commerce, although plaintiffs, not any authorized dealer, performed the necessary installation and warranty service; and where this penalty was designed to and did make it economically impossible for plaintiffs to continue to compete; are plaintiffs, the target-victims of this alleged conspiracy in violation of Section 1 of the Sherman Act, whose damages are distinct from damages which could have been suffered by their supplier, entitled to recover damages under Section 4 of the Clayton Act, or are they barred by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ("Illinois Brick") from recovering such damages?

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IN THE SUPREME COURT OF THE UNITED STATES

October, Term, 1983

No. 83-

MERICAN, INC.; MERICAN CURTIS, INC.;
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Petitioners

v.

CATERPILLAR TRACTOR CO.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The 2-1 Opinion of the Court of Appeals (Circuit Judge Hunter and District Judge Gerry, with Circuit Judge Higginbotham, dissenting), dated July 26, 1983, is reported in 713 F.2d 958 (3d Cir. 1983) and in 1983-2 Trade Cas. ¶65,511. (App. A to this petition).[1] The unreported

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[1] References to "App." are references to the appendices to this Petition. References to "3d Cir. App." are references to the Joint Appendix on appeal.

oral Opinion and Order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.), dated July 2, 1982, denying defendant-respondent Caterpillar Tractor Co.'s ("Caterpillar's) motion to dismiss or in the alternative for summary judgment, is reproduced as Appendix B hereto.

In an Amended Order dated August 16, 1982 (App. C hereto), the District Court certified a controlling question of law pursuant to 28 U.S.C. 1292(b) which is similar to but less detailed than the "question presented," supra.

JURISDICTION

After the divided Court of Appeals entered Judgment (App. D), a timely petition for rehearing and rehearing in banc was denied on September 9, 1983 by vote of 6-4. (Circuit Judges Gibbons, Higginbotham, Sloviter and Becker would have granted rehearing in banc.) (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

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[2]In accordance with Supreme Court Rule 21.1(f), the "statutes involved" herein are set forth in Appendix F. Pursuant to Supreme Court Rule 28.1, plaintiffs state that Merican, Inc. is owned by Scovill Holdings, Inc. Merican Curtis, Inc. is a wholly-owned subsidiary of Merican, Inc. Merican Curtis, Ltd., a foreign corporation, is owned by James C. Hutson-Wiley. Subsidiary and affiliate companies of plaintiffs are: WEMS Manufacturing,

(footnote continued next page)

STATEMENT OF THE CASE

The Plaintiffs

Plaintiffs are two Pennsylvania corporations (one a DISC) and one Liechtenstein corporation. From 1978 through the fall of 1981, plaintiffs purchased over $22.6 million worth of Caterpillar electric generator sets in the United States from Ohio Machinery Co. ("OMCO"), an authorized Caterpillar dealer (their sole supplier for the purpose of this case). Plaintiffs resold the generator sets primarily in the Middle East, largely in Saudi Arabia. (3d Cir. App. 196-200F, 261-64G, 357G).[3] Plaintiffs themselves, or their customers, normally performed the necessary delivery, installation, inspection and warranty service for users of Caterpillar electric generator sets, largely in

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(footnote continued)
Ltd., Merican Curtis Hong Kong, Ltd., Merican Curtis (UK) Ltd., Merican Curtis SRL, Merican Curtis Financial Services, Merican Curtis Far East, Ltd., Spectest, Ltd., UPE, Inc. and Fleet Power GMC Trucks, Inc.

[3]Saudi Arabia is by far the largest market in the world for the export of Caterpillar electric generator sets; just prior to the 1980 implementation of the non-refundable "penalty" fee at issue, it accounted for approximately 64% of all such exports from the United States. (3d Cir. App. 357G).

competition with authorized Caterpillar dealer Zahid Tractor and Heavy Machinery Company, Ltd. ("Zahid"). (3d Cir. App. 11B, 13-14B, 199-201F, 206-17F). At substantial cost, plaintiff Merican Curtis, Ltd. maintained a facility in Saudi Arabia to enable the performance of such services. (3d Cir. App. 199-201F).[4]

The Restraint

Prior to July, 1978, when an authorized Caterpillar dealer sold a Caterpillar electric generator set into the territory of another authorized Caterpillar dealer, if the dealer into whose territory the set was sold provided warranty service, it made a claim and obtained a fee from the original selling dealer of 5% of the Caterpillar list price. Since authorized Caterpillar dealers normally did not have to provide service on the generator sets sold to plaintiffs (since plaintiffs did so), the need for payment of the additional 5% did not arise

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[4]When the competition posed by plaintiffs' marketing and servicing was brought to its attention, Caterpillar recognized the substantial competition posed by plaintiffs, and the excellence of plaintiffs' power plant design, engineering, and servicing. (3d Cir. App. 202-07F, 209-16F, 221-22F, 267-75G, 302-06G, 312-15G, 353G). The government of Saudi Arabia also utilized plaintiffs' services. (3d Cir. App. 267-68G).

(3d Cir. App. 205-06F.)

In July, 1978, after plaintiffs and other independent resellers increased their level of competition in the export and servicing of Caterpillar electric generator sets, Caterpillar instituted the predecessor of the program at issue here. It required an authorized dealer which sold a set for initial substantial use outside of its Caterpillar territory to pay the 5% fee to Caterpillar in advance. Caterpillar transferred it to a claiming authorized dealer if such dealer were required to provide warranty service. If no claim was made within one year, the 5% fee was to be returned (without interest). (3d Cir. App. 206F).[5]

Caterpillar conducted a study and concluded in 1979 that plaintiffs posed a major competitive threat (3d Cir. App. 202-07F, 209-16F, 221-22F, 267-75G, 302-06G, 312-15G, 353G), finding plaintiffs had a "good sound reputation in construction and after sale support capability" (3d Cir. App. 271G), "excellent contacts in the Middle East"; engineered most "Cat gen sets into

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[5]Caterpillar's documents confirm that (whatever its formal articulation of the 1978 fee program) fees from OMCO were exacted in advance (i.e. were not delayed until a claim was filed) because of Caterpillar's characterization in 1979 of plaintiffs as a "reseller" (3d Cir. App. 302G, 306G).

complicated service centers," "service what they sell," and "maintain an inventory of gen sets". Caterpillar concluded "their business approach is a retail sales approach in a manner similar to that used by a Cat dealer" (3d Cir. App. 270G, 306-07G).[6]

In January, 1979, Caterpillar President Robert E. Gilmore conferred in Saudi Arabia with Zahid's President, Talil Zahid. Zahid "expressed his concern over activities of dealers in Saudi Arabia" (App. 276G). Gilmore told Zahid that "measures are being investigated" (3d Cir. App. 276G). Zahid thanked Caterpillar for the visit and for its "interest and concern" (3d Cir. App. 295G).[7]

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[6]OMCO advised Caterpillar that plaintiffs specialized in the design and engineering of power plants; had repaired equipment sold by various authorized Caterpillar dealers; had redesigned and modified Caterpillar equipment which was improperly designed for certain environments; that they provided financial service and 24-hour field service; and had a trained staff in London, Rome, Philadelphia and Saudi Arabia. OMCO stated that plaintiffs' service had uniformly been accomplished in "a most professional and impressive manner." (3d Cir. App. 267-68G).

[7]Zahid reiterated that it was concerned not only with marketing competition but with increased "parts and service" competition posed by

(footnote continued next page)

Shortly thereafter, Caterpillar's L.E. Wallden telexed Zahid and two other Middle Eastern Caterpillar dealers. Caterpillar requested from the dealers "urgent information" concerning plaintiffs' "inventory, parts inventory, physical facilities, local sponsor and possible sales coverage". In the Wallden telex Caterpillar assured them that "[w]e are doing what we can to slow down their pipeline of Caterpillar equipment." (Emphasis added).

Caterpillar denies that it was involved in a "boycott" of plaintiffs,[8] and the question certified in 1982 for interlocutory appeal did not relate directly to the boycott issue. The Wallden telex indicates that Caterpillar was, in cooperation with its dealers, seeking jointly to effect a boycott -- "doing what we can to slow down their pipeline." It suggests that acts besides the fee system (which was not changed to

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(footnote continued)
independent marketers, "an alarming trend", which "jeopardized" Zahid's profits. Zahid concluded "we seek your support in steming [sic] this invasion and damaging attack . . . . (3d Cir. App. 296G) (see also 3d Cir. App. 309-11G).

[8]See, e.g., Caterpillar's Reply Brief on appeal (p. 5), in which a section heading recites: "This Case Does Not Involve A Boycott."

the "fee penalty" until the next year) were involved.[9]

In 1979, plaintiffs or their customers continued to provide necessary warranty service, and thus the existing "refundable" 5% fee did not significantly affect plaintiffs' ability to compete. (3d Cir. App. 213-14F, 221-22F, 312-15G, 353G.)[10] Competition by independent marketers grew in 1979 (3d Cir. App. 297G, 357G).

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[9]The Third Circuit panel majority stated in its Opinion that plaintiffs' "boycott" characterization did not appear to be substantial and that the essence of the claim related only to the fee penalty. The panel criticized the lack of specific "boycott" allegations in plaintiffs' Amended Complaint (App. A, p. 19 n.21), ignoring the fact that it was filed in May, 1981, before any discovery was obtained (3d Cir. App. 22B). Cf. Poller v. CBS, Inc., 368 U.S. 464, 473 (1962) (in antitrust conspiracy cases, "the proof is largely in the hands of the alleged conspirators" and comes to light only through discovery). If a boycott was involved (of which the financial penalty was a part), Illinois Brick would not apply. Mid-West Paper Products, Co. v. Continental Group, Inc., 596 F.2d 573, 585 and 585 n.47 (3d Cir. 1979).

[10]Caterpillar reported in late 1978 that OMCO had "never received a [warranty] claim from the [authorized] Caterpillar dealer where the engines [sold by OMCO to plaintiffs] are used", and OMCO's pricing to [plaintiffs] had therefore "not considered service fee payment [i.e. the 5% refundable fee then in existence] in recent deals" (3d Cir. App. 274G).

Zahid continued to complain concerning the horizontal price and service competition caused by plaintiffs and similar independent marketers (3d Cir. App. 276G, 295-96G, 308-11G, 318-19G). In January, 1980, Caterpillar President Gilmore acknowledged the "increasing competitive strength" Zahid faced, assuring Zahid "[w]e are very much aware of the activities of third parties supplying Caterpillar machines and parts in your territory and continue to work toward solutions within the constraints of U.S. law" (3d Cir. App. 316-17G). Zahid responded that "we particularly appreciate your concern"; that this was "an area of paramount concern;" and that the competition was "causing damage to our pricing structure," resulting in "greatly reducing our already reasonable profit margin." Zahid again requested Caterpillar to do "[a]nything that could be done to alleviate this situation". (3d Cir. App. 319G).

Finally, in February, 1980, Caterpillar instituted the non-refundable fee penalty; Caterpillar now retained the "warranty fee" for itself as "miscellaneous income" even when no authorized dealer made a legitimate fee claim, i.e. when the warranty service was accomplished by others (notably plaintiffs). The fee was a penalty imposed on all sales to plaintiffs, and

was triggered by plaintiffs' transporting of the equipment abroad. (3d Cir. App. 325G, see 3d Cir. App. 322G, 135E).[11]

Zahid thanked President Gilmore for instituting the penalty, which it called "very encouraging", and which Zahid understood was designed "to rectify the problem of encroachment." (3d Cir. App. 351G.) OMCO too understood its implications; though plaintiffs continued to provide excellent service, OMCO recognized its pricing to plaintiffs would necessarily change (3d Cir. App. 352- 53G).[12]

Plaintiffs had built a substantial business and goodwill in the marketing and servicing of Caterpillar electric generator sets and attempted to continue to market and service them for business reasons, in spite of the lack of

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[11]This non-refundable fee was retroactive; unclaimed fees paid in advance prior to the end of February, 1980, i.e. under the 1978-79 program, were not to be refunded, under any circumstances. (3d Cir. App. 353G.) In the Third Circuit panel Opinion, there is a typographical error. At page 4, ¶4, "1978" should be "1980." (App. A, p. 4).

[12]OMCO reiterated that, as a result of plaintiffs' marketing, "a void has been filled and Caterpillar product supplied in place of competitive product. In almost every opportunity, the local Cat dealer has not been the customer's alternative." (3d Cir. App. 353G.).

any significant profit on the sales in the wake of the fee penalty (3d Cir. App. 264-65G). By the fall of 1981, however, plaintiffs were required for economic reasons to transfer their Caterpillar electric generator set business in Saudi Arabia to OMCO, and ceased marketing Caterpillar electric generator sets in the Middle East and elsewhere (3d Cir. App. 261G, 265-66G; see 3d Cir. App. 223-225F).[13]

Only the institution of the 5% non-refundable fee (equivalent to 20% of the margin between the wholesale and retail price) insured

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[13]Plaintiffs continued to market and service the sets until then for several reasons. They realized a cash flow advantage, owing to the time of receipt of funds from a sale and the time of payment by plaintiffs to their supplier. Plaintiffs' principal customer, Rabiah & Nassar Co. ("Ranco"), dealt in other products with plaintiffs' group, and plaintiffs desired to maintain the relationship with Ranco. Ranco had built its reputation with respect to generator sets as a marketer of Caterpillar sets; plaintiffs were geared up to support and were concentrating upon such marketing; and it was not the type of business which was feasible to terminate quickly. Moreover, reduction of a large percentage of sales would be viewed negatively in evaluation of plaintiffs by financial institutions. Finally, plaintiffs had filed suit by September, 1980, and hoped that the result of the litigation would be to eliminate the fee penalty. (3d Cir. App. 265-65G).

that, regardless of the service provided by plaintiffs, sales to plaintiffs would be subject to a large penalty, and plaintiffs' ability to profit and ultimately to compete would be eliminated. The innovative scheme targeted the competition generated by plaintiffs and by other independent competitors; in plaintiffs' case, it was as effective as an overt boycott, which, as the Wallden telex suggests, may also have existed.[14]

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[14] This Court cautioned in Simpson v. Union Oil Co., 377 U.S. 13, 24, reh. denied, 377 U.S. 949 (1964) that "legality for antitrust purposes" may neither "turn on clever draftsmanship," nor upon "easy manipulation." As Judge Bue observed in Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945, 952 (S.D. Tex. 1972): "At the time the Sherman Act was enacted its drafters obviously could not foresee the many sophisticated business and economic arrangements in American industry that have emerged in recent years, nor could they anticipate the multiple varieties of innovative devices that have been conjured up by inventive businessmen in an effort to circumvent section 1 of the Act."

It is not unlikely that, in 1980, Caterpillar recognized that Illinois Brick could be used in an attempt to immunize it from any liability, since its dealers would be most unlikely to jeopardize their huge investments by suing it, and since it might be able to argue in Court that everyone else was an "indirect purchaser" barred by Illinois Brick.

The institution of a vertical restraint as a result of horizontal pressure to prevent price competition constitutes a per se violation of Section 1 of the Sherman Act. Zidell Explorations, Inc. v. Conval International, Ltd., Nos. 82-3511 and 82-3541 (Slip. Op. 9th Cir. November 10, 1983); Cernuto v. United Cabinet Corporation, 595 F.2d 164 (3rd Cir. 1979). A similar, though more benign "warranty fee" sham was struck down in Eiberger v. Sony Corporation, 459 F.Supp. 1276 (S.D.N.Y.) (per se and rule of reason violation), affirmed as to liability, 622 F.2d 1068 (2nd Cir. 1980) (rule of reason violation; court held it was not required to reach per se issue).

REASONS FOR GRANTING THE WRIT

This case presents questions concerning the applicability of Illinois Brick to a factual situation considerably different from the horizontal price-fixing conspiracy presented in Illinois Brick. The division in the Third Circuit reflects its uncertainty in defining the parameters of the Illinois Brick rule, especially in light of this Court's holding in Blue Shield of Virginia v. McCready, 457 U.S. 462 (1982), recognizing that antitrust damage recoveries may not be limited to only one injured party, and in Associated General Contractors of

California v. California State Board of Carpenters, _____ U.S. _____ 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), recognizing the relevance, for the purpose of the right to recover damages, of plaintiffs' status as the target of the conspiracy. The Third Circuit panel Opinion threatens the efficacy of private antitrust enforcement, which is particularly favored by this Court, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); it unintentionally provides means by which, employing clever draftsmanship, a party may violate the antitrust laws yet avoid liability by structuring an anticompetitive scheme to include an "Illinois Brick" overcharge element. Under Rule 17(c) of this Court, certiorari should be granted to review these important questions of antitrust law.

The Court of Appeals' Decision Misapplied Illinois Brick

In Illinois Brick, Illinois sued manufacturers of concrete block seeking damages under Section 4 of the Clayton Act. Plaintiff, an "indirect purchaser," alleged that defendants had conspired horizontally to fix the manufacturers' prices.

This Court ruled that Illinois could only prove antitrust injury by proving that an overcharge was passed on to it by a direct purchaser, and it was therefore barred from recovery. 431 U.S. at 727. It ruled that the "passing on" defense prohibited by Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), should apply equally, and thus barred "offensive" use of a pass-on by a plaintiff. It sought to avoid duplicative recovery of the same damages from a defendant, and undue complexity of damage analysis where such complexity would frustrate rather than encourage private antitrust suits. 431 U.S. at 730-33, 737. The overriding goal of Illinois Brick was to further the "long-standing policy of encouraging private enforcement of the antitrust laws," 431 U.S. at 745, in order that (a) a defendant would not retain the fruits of its illegal conduct and (b) victims of antitrust violations would be compensated for their injuries. 431 U.S. at 746.

Unlike the normal Illinois Brick horizontal price-fixing case, in which the conspirators are not concerned with which level of purchasers are harmed, but merely seek to obtain an enhanced price, in the present case, the very object of the conspiracy was to eliminate sales

and service competition by marketers such as plaintiffs, under the guise of "insuring" the provision of the very warranty service which plaintiffs themselves furnished.

In dissenting in this case, Judge Higginbotham recognized, as had the District Court (VanArtsdalen, J.), that the enforcement and compensation concerns which are central to Illinois Brick (as reaffirmed in Blue Shield, infra,) were best served by enabling plaintiffs to assert their damage claim under Section 1, and that Illinois Brick should not be expanded beyond its confines to any conceivable factual situation which an ingenious party might devise. Thus, even assuming that plaintiffs' supplier OMCO could sue for "overcharge" damages (a remote possibility, see infra), the dissent recognized that prosecution of this suit would be both "consistent with Illinois Brick and necessary to avoid immunizing the anti-competitive tactic" alleged. (App. A. p. 23). The dissent stated:

> ****[P]laintiffs alleged loss of sales and profits, reduction in the value of goodwill, and destruction of a significant portion of their businesses . . . . Many of these alleged injuries are unique to the plaintiffs, and their complaint comprises more damage than the intermediary Ohio Ma-

> chinery Company could recover were it to bring its own action. By putting treble damages outside of plaintiffs' reach, the majority effectively places complete recovery outside of anyone's reach. Under the majority's approach, plaintiffs cannot be made whole -- notwithstanding the impossibility of duplicative recovery -- and defendants cannot be made to give up the fruits of an alleged illegality.**** Likewise, allowing the instant suit to go forward is necessary to the attainment of the goal of deterrence. . . . This is not a case where passed-on overcharges are so splintered that no indirect purchaser would be interested in pursuing relief; here plaintiffs allege predatory destruction of their business -- a complaint which only they may bring. (App. A, pp. 23, 26-27).

The Court of Appeals Decision
Cannot Be Reconciled With Blue Shield

In Blue Shield, the plaintiff, a consumer of medical services, sought treble damages for injury resulting from an alleged conspiracy to boycott and exclude psychologists from receiving compensation under a health plan, thereby reducing their ability to compete effectively with psychiatrists whose services were covered by the plan. (The services of a psychologist were covered only when such services were billed

through a physician). Plaintiff sought recovery of the costs which she incurred as a customer of psychologists' services, for which she had paid, but for which she was not reimbursed by the plan.

This Court held that the right to sue under Section 4 of the Clayton Act was "expansive"; that it had "refused to engraft artificial limitations on the Section 4 remedy," 457 U.S. at 472; and that the Court would not "add requirements to burden a private litigant beyond what is specifically set forth by Congress...." 457 U.S. at 472 n.9. It held that more than one person or class of persons damaged by an antitrust violation may sue for damages, recognizing that the Section 4 remedy "cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." 457 U.S. at 479.[15]

In reaching its conclusions, this Court in Blue Shield looked:

> (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged

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[15] By contrast, unlike McCready, plaintiffs in the present case were the "competitors whom the conspirators hoped to eliminate from the market."

> with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under §4.

457 U.S. at 478.

This Court held that McCready could sue for damages since, although she was not the "target," her injury was "clearly foreseeable", "was a necessary step in effecting the ends of the alleged illegal conspiracy", 457 U.S. at 479, was "intertwined" with that suffered by the boycotted psychologists, 457 U.S. at 484, and because she was "within that area of the economy . . . endangered by [the] breakdown of competitive conditions" 457 U.S. at 480-81. Injury to plaintiffs in the present case was the end sought by the illegal conspiracy.

In Blue Shield this Court explained that the rule of Illinois Brick is to be applied narrowly, focusing on its avoidance of "duplicative recovery" of a single overcharge. 457 U.S. at 474. This Court held that "if [Illinois Brick had] a subordinate theme" it may be that "in certain limited circumstances" the fact that damages can only be proven by a plaintiff by use of "massive evidence and complicated theories" could be relevant, but the avoidance of extreme

difficulties of damage proof is only appropriate when to accept such proof would be "to discourage vigorous enforcement of the antitrust laws by private suits." 457 U.S. at 475 n.11. See, Merican Inc. et al. v. Caterpillar, App. A. pp. 26-27 (Higginbotham, J., dissenting).

This Court's Opinion rejects the view stated by Justice Rehnquist in dissent that Illinois Brick must bar recovery by either McCready or by the psychologists. 457 U.S. at 492 n.8. The dissent recognized the parameters of the Blue Shield holding. 457 U.S. at 491. Similarly, in the present case, the District Court rejected defense counsel's suggestion that Blue Shield was merely a restatement of general principles with respect, inter alia, to Illinois Brick, stating: "If that is all that Blue Shield stands for then it would seem to me rather odd that the Supreme Court would even have accepted certiorari in the case . . . ." (3d Cir. App. 412I.) The District Court held that it is "clear" from Blue Shield that, contrary to the "very wide or broad interpretation" by some lower courts (App. B. p.2), "it is improper to just mechanically apply the Illinois Brick doctrine and thereby exclude in every case anybody who is not a direct purchaser . . . ." (App. B.

p. 2). Refusing to exalt form over substance, see Simpson v. Union Oil Co., supra, the District Court held:

> It is true that in carrying out [the] conspiracy in effect it was aimed in such a way that prices that the plaintiff[s] would have to pay for the products were increased, but as I understand it, the injury is not the increased price itself, but simply that the increased price is what brought about injury such as forcing plaintiffs out of business and lost profits.
>
> It would seem to me that the antitrust laws are, among other things, very definitely for the purpose of protecting businesses from being the target of a conspiracy to drive them out of business. (App. B, pp. 2-4) (emphasis added).

See, Blue Shield, 457 U.S. at 478.[16].

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[16]It is noteworthy also that in a February 22, 1982 affidavit submitted to Caterpillar's counsel by President Thomas Taylor of OMCO (3d Cir. App. 110E), he states that OMCO did not suffer any damage as a result of the fee penalty or its predecessor program:

> Neither the existence of the 5% ISF [warranty fee] nor any changes in Caterpillar's administration thereof, including the 1978 or 1980 changes, has had any apparent effect on Ohio Machinery's incentive

(footnote continued next page)

In addition to relying upon this Court's opinion in Blue Shield, the District Court and the panel dissent relied upon the Third Circuit's interpretation of Illinois Brick in Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), in which the Court limited Illinois Brick to above-market horizontal price-fixing cases and held that vertical restrictions and boycotts were not within the Illinois Brick rule. 596 F.2d at 585 and 585 n.47.[17]

(footnote continued)

> or ability to sell Caterpillar electric generator sets outside its service territory generally or in Saudi Arabia specifically (emphasis added).

The OMCO affidavit makes clear, at a minimum, how infinitesimal is the chance that OMCO could sue Caterpillar successfully for any damages resulting from the transactions involving plaintiffs. Plaintiffs are moving in the District Court to amend their Complaint to allege also a common law tort, which motion Caterpillar is expected to oppose, but this has no relevance to the substantial antitrust damage question presented here.

[17] The District Court stated that Mid-West "foreshadowed" Blue Shield. (App. B. p. 3). Similarly, in Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd., 494 F. Supp. 1246, 1255-56 (E.D. Pa. 1980), the Court declined de-

(footnote continued next page)

The Court of Appeals' Decision Cannot Be Reconciled with Associated General Contractors

The panel majority also failed to heed the teaching of this Court in Associated General Contractors, which denied standing to a union where "the union was neither a consumer nor a competitor in the market in which trade was restrained", and where it was "not clear whether the union's interests would be served or disserved by enhanced competition in the market." Id. at 909. This Court recognized that "[t]he most specific allegations relate to the labor relations between the parties. . . . and therefore involve matters that are not subject to review under the antitrust laws." Id. at 900, 902. The union's damages were several times removed from the acts causing damage, Id. at 904; see

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(footnote continued)
fendants' suggestions to "read [Illinois Brick] broadly", and held that "the cases which have construed Illinois Brick have, for the most part, refused to extend it beyond its confines." 494 F. Supp. at 1255. See, In Re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1107-09 (C.D. Cal. 1979); Petrol Stops, Northwest v. Continental Oil Co., 1978 Trad. Cas. ¶62,304 at p. 75,885 (D. Ariz. 1978); "Antitrust Law-Price Fixing - Proving Injury under Section 4 of the Clayton Act . . .", 60 Wash. U.L.Q. 716, 723 (Summer, 1982).

Id. at 909-10 and 909 n.46; and the union's claim rested upon "nothing but speculation." Id. at 911.

This Court concluded that "the union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the union" were an insufficient basis upon which to grant it standing given the other circumstances of the case described above. Id. at 913. However, while the union's claimed status as "target" was not, alone, sufficient to confer upon it a right to sue for damages, the Court did not hold, as Caterpillar may argue, that a party's status as a "target" can never be significant in determining whether it may recover antitrust damages. It may not be of "controlling" importance, 103 S. Ct. at 908 n. 37, but it is relevant. Indeed, Blue Shield and Associated General Contractors both emphasize the importance of the "nexus" between the violation and the harm to plaintiff.

Associated General Contractors holds that, while a plaintiff's status as alleged "target" of a violation is not a "panacea" to enable every complaint to withstand a motion to dismiss, yet in an appropriate case "an allegation of improper motive [toward plaintiff] . . . may sup-

port a plaintiff's damages claim under Section 4." Id. at 908; see Id. at 908 n.35[18]

The significance of the Third Circuit panel's failure to consider the relevance of plaintiffs' status as targets, and to consider all of the factors discussed in Associated General Contractors and Blue Shield, rather than mechanically misapplying Illinois Brick, is apparent from Associated General Contractors' discussion of recovery of damages by a target which is indirectly "hit." This Court held that, in 1890, Congress anticipated that "well accepted common law rules" would govern antitrust damage litigation, 103 S. Ct. 906, and that, while the general common law tort rule provides that a plaintiff's injury caused by defendant's conduct with respect to a third party is often too remote to sustain a recovery, a plaintiff may recover damages if defendant's act directed at a third party is a "willful" act, the "purpose" of which is to harm the plaintiff. In other words, a plaintiff which is indirectly injured may not

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[18]This Court also cited authority which held that the "specific intent" of defendant is "ordinarily" sufficient to confer standing, particularly, but not limited to cases involving an effort to boycott plaintiffs, i.e. an effort, as here, jointly to eliminate plaintiffs' competition from the market. Id. at 908 n. 35.

recover damages "unless the wrongful act is willful for that purpose" 103 S. Ct. at 906, n. 25 (citing J. Sutherland, A Treatise on the Law of Damages.) (Emphasis added). In the present case it is alleged, and the evidence confirms that Caterpillar's conduct (imposition of the non-refundable fee) toward the "third party" (OMCO) was aimed at injuring the target's (plaintiffs') ability to compete. In other words, "the wrongful act [was] willful for that purpose," 103 S. Ct. at 906 n.25, and plaintiffs have the right to sue for and recover antitrust damages.

This Court held in summary:

> [T]he infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case.**** [Our] prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. Last term in Blue Shield of Virginia v. McCready, supra, we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under §4.

103 S. Ct. at 908-09 (footnotes omitted). As the District Court recognized (App. B. p. 4) plaintiffs' injury caused by a conspiracy to drive them out of business "was of a type that

Congress sought to redress in providing a private remedy for violations of the antitrust laws," Blue Shield, 457 U.S. at 483; Accord, Associated General Contractors, 103 S. Ct. at 909.

It is evident that a substantial divergence of view exists concerning the appropriate application of this Court's pronouncements in Illinois Brick, Blue Shield and Associated General Contractors. District Judge VanArtsdalen and Circuit Judge Higginbotham interpreted the decisions of this Court to permit assertion of plaintiffs' damage claim; Circuit Judge Hunter and District Judge Gerry (sitting with the panel) took a different view. The full Court of Appeals split 6-4 in ruling upon plaintiffs' motion for rehearing in banc. Clarification from this Court is required in order to permit the proper implementation of this Court's decisions.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Date: December 2, 1983

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1577

MERICAN, INC. and MERICAN CURTIS, INC.
and MERICAN CURTIS, LTD.

v.

CATERPILLAR TRACTOR CO.

Caterpillar Tractor Co., Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 80-3723

Argued April 12, 1983

Before: HUNTER, HIGGINBOTHAM, *Circuit Judges* and GERRY,* *District Judge*

(Opinion filed July 26, 1983)

John DeQ. Briggs, III (Argued)
David C. Murchison
William E. Wallace, III
Albert C. Loebe
Howrey & Simon
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Attorneys for Appellant

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*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

Robert G. Levy (Argued)
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OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. This interlocutory appeal requires us to address the limits imposed by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), on liability for treble damages under section 4 of the Clayton Act, 15 U.S.C.A. §15 (West Supp. 1983). The issue arises in an action filed by plaintiff-appellees Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd. ("Appellees") against defendant-appellant Caterpillar Tractor Company ("Caterpillar"). Appellees allege that Caterpillar violated section 1 of the Sherman Act, 15 U.S.C. §1 (1976), by illegally imposing a penalty on its dealers in order to eliminate the source of supply of Caterpillar products to Appellees and other independent marketers. Following the district court's denial of Caterpillar's motion to dismiss, we granted appellate review under 28 U.S.C. §1292(b) (1976) to address the question of whether Appellees are precluded from maintaining a private damage action by operation of the rule of *Illinois Brick*. We hold that the district court misconstrued the scope of *Illinois Brick* and its progeny and that it erred by refusing to grant Caterpillar's motion to dismiss Appellees' claims for damages.

2. This case involves the international sale and distribution of electric generator sets designed, manufactured, and marketed by Caterpillar.[1] To distribute its generator sets Caterpillar employs a world-wide network of authorized Caterpillar dealers who function generally as retail sellers of Caterpillar products. Each of those dealers enters into a Distribution Agreement with Caterpillar which provides for, *inter alia*, the promotion, distribution, installation, and servicing of Caterpillar-manufactured products by the dealers. Under that agreement each dealer has an area of service responsibility in which he agrees to maintain one or more suitable places of business, to maintain adequate service facilities, to employ trained salesmen to market Caterpillar's products, and to employ trained technicians and mechanics to render diagnostic and mechanical service to all users of Caterpillar products in the dealer's service area. In addition each dealer agrees to provide, free of charge to the user, delivery, inspection, and warranty services with respect to all Caterpillar products that receive their "initial substantial use" in that dealer's service territory, regardless of when, where, or by whom the product may have been sold.

3. Under the Distribution Agreement in effect in 1978, Caterpillar agreed to sell new generator sets to its dealers at a discount of 25% off the list price. Caterpillar allocated 5% of that discount as reasonable compensa-

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1. An electric generator set typically consists of a diesel engine, a generator, a battery, a governor, and transfer switches. It is used to provide "prime" power to buildings and clusters of buildings without access to central power sources and to provide "standby" power to hospitals, schools, or other buildings. Caterpillar has sold a number of generator sets outside of the United States, specifically in the Middle East, for use in areas isolated from central sources of electrical power.

tion for the dealer's obligation to assume the responsibility of providing delivery, inspection, and warranty services described above. If a dealer sold a generator set that received its initial substantial use in a second dealer's service territory, the selling dealer was not entitled to the 5% "service fee" and thus was only entitled to keep a 20% discount. Under the Distribution Agreement the selling dealer was required to return the 5% to Caterpillar, which in turn transferred it to the dealer responsible for providing service, if that dealer filed an appropriate claim. Caterpillar had a practice of returning the service fee to the selling dealer if the servicing dealer did not claim the fee within one year.[2] Thus if a selling dealer sold a generator set for use outside his territory to an independent marketer who provided full warranty service, the selling dealer could adjust his price down knowing that another Caterpillar-authorized dealer would not have to provide service and accordingly would not claim the fee.

4. In 1978 Caterpillar instituted a new system for collecting the 5% service fee from its dealers. Under the new system Caterpillar no longer returned the service fee to a selling dealer when the servicing dealer made no claim for the fee. Instead the company retained all unclaimed service fees as miscellaneous income. The practical result of Caterpillar's new system was that its dealers could not provide as large a price reduction off the list price when they sold a generator set to an independent marketer for resale outside of the selling dealer's service area.

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2. Prior to 1978 many dealers who sold generator sets receiving their initial substantial use in another dealer's service territory would simply transfer the 5% service fee directly to the servicing dealers. In July of 1978, Caterpillar began insisting that its dealers strictly comply with the terms of the Distribution Agreement. Thus, as soon as a dealer knew that a generator set it was selling would receive its initial substantial use in another dealer's territory, he had to remit the 5% to Caterpillar, even if the servicing dealer had not yet claimed the fee.

5. Appellees are general trading companies engaged in the international marketing and servicing of numerous products. In the mid-1970's Appellees began to trade in Caterpillar electric generator sets by purchasing them in the United States and then reselling them in the international market. Appellees purchased the sets primarily from Ohio Machinery Company ("OMCO"), a Caterpillar-authorized dealer located in Cleveland, Ohio. They would then resell them in competition with Caterpillar-authorized dealers in Europe and the Middle East, specifically Zahid Tractor and Heavy Machinery Company ("Zahid"), Caterpillar's authorized dealer in Saudi Arabia. Appellees or their reseller-customers performed the necessary delivery, installation, inspection, and warranty service for the users of the generator sets.

6. Appellees allege that Caterpillar changed its fee system in 1980 because of Appellees' competition in selling generator sets in Saudi Arabia. Appellees claim that the new system was the result of a combination and conspiracy between Caterpillar and Zahid "to allocate customers and territories for the sale of Caterpillar electric generator sets and to foreclose [Appellees] and other generator set marketers from engaging in price competition with defendant's authorized dealers." Complaint ¶21, app. at 18B.[3] Appellees allege that the service fee in effect became an "automatic penalty" imposed on dealers who sold generator sets for use outside their territory. They claim that because of Caterpillar's new policy, they have suffered substantial losses in sales and profits and have been restrained from securing new business. Appellees also allege that prices of electric generator sets have been artifically stabilized and maintained, that competition in the sale of the generator sets has been substantially lessened or eliminated, that Caterpillar's

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3. Appellees allege that other unnamed corporations, firms, and individuals also participated as co-conspirators. Complaint at ¶9, app. at 9B.

authorized dealers have been prevented from distributing generator sets in territories and to customers of their choosing, and that purchasers of the generator sets have been deprived of the opportunity to purchase those products from suppliers of their own choice at competitive prices.

B

7. On September 25, 1980, Appellees filed this action in the United States District Court for the Eastern District of Pennsylvania. They filed an amended complaint on May 26, 1981. In their amended complaint Appellees claimed that Caterpillar's service fee system violated section 1 of the Sherman Act, 15 U.S.C. §1 (1976).[4] Appellees sought monetary and injunctive relief under sections 4 and 16 of the Clayton Act, 15 U.S.C.A. §15 (West Supp. 1983); 15 U.S.C. §26 (1976 & Supp. II 1978).

8. On March 1, 1982, Caterpillar filed a motion to dismiss[5] based on the rule of *Illinois Brick* that "indirect purchasers" are precluded from suing for passed-on damages under section 4 of the Clayton Act. *See Illinois Brick*, 431 U.S. at 746.[6] After hearing argument the dis-

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4. Section 1 of the Sherman Act states in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. §1 (1976).

5. In the same motion Caterpillar also sought summary judgment claiming that the district court was without jurisdiction to hear Appellees' claims. The district court denied that part of Caterpillar's motion holding that it had jurisdiction over Appellees' claims. App. at 452I-53I. We see no reason to disturb the district court's holding on that issue.

6. In its motion Caterpillar conceded that the rule of *Illinois Brick* would not bar Appellees from seeking injunctive relief under §16 of the Clayton Act, 15 U.S.C. §26 (1976). App. at 102D; *see Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979).

trict court issued an order from the bench on July 2, 1982, denying Caterpillar's motion. While recognizing Appellees' status as indirect purchasers, the district court held that based on the then-recent opinion of *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540 (1982), it was improper "to just mechanically apply the *Illinois Brick* doctrine and thereby exclude in every case anybody who is not a direct purchaser from the original seller or the manufacturer." App. at 451I. Because the Appellees had alleged that they were the "direct target[s] of an unlawful conspiracy," the district court held that under *Illinois Brick*, as interpreted by *Blue Shield*, Appellees could maintain their action for damages. App. at 452I-53I. On August 16, 1982, the district court entered an amended order denying Caterpillar's motion to dismiss and certifying a controlling question of law for immediate appeal pursuant to 28 U.S.C. §1292(b) (1976).[7]

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7. The question certified by the district court reads:

> When an alleged conspiracy between an electrical generator manufacturer and one of its authorized foreign dealers is formed to hinder and/or exclude intra-brand competition in the foreign market by an independent, non-factory authorized dealer who purchases from other authorized dealers for resale in the foreign market, whereby the manufacturer imposes a non-refundable "5% warranty service fee" on all sales by authorized dealers when the generators are to be installed for initial use outside of the authorized selling dealer's assigned geographical service territory, is the "target-victim" of the conspiracy (the independent non-factory authorized dealer) precluded from maintaining a private damage action against the manufacturer under Section 4 of the Clayton Act (15 U.S.C. §15) by operation of the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)?

App. at 457J-58J.

On a §1292(b) appeal we consider all grounds which might require a reversal of the order appealed from. *Murphy v. Heppenstall Co.*, 635 F.2d 233, 235 n.1 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974); *see* C. Wright & A. Miller, *Federal Practice and Procedure* §3931 (1977 & Supp. 1983).

We granted Caterpillar's petition for permission to file an interlocutory appeal on September 20, 1982.

II

9. Section 4 of the Clayton Act provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C.A. §15 (West Supp. 1983). On its face section 4 is written very broadly. If read literally it is expansive enough to encompass any injury that could be attributed directly or indirectly to the consequences of an antitrust violation. The Supreme Court has held, however, "that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 907 (1983) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)). Rather section 4 claims must be considered in light of the statutory purposes behind the awarding of treble damages: to deter antitrust violators and deprive them of "the fruits of their illegality," and to compensate victims of antitrust violations for their injuries. *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314 (1978). In light of those statutory policies, the Supreme Court has recognized two types of limitations on the availability of the section 4 remedy which courts must consider when examining whether a treble damage action may be maintained. *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540, 2545-46 (1982); *see In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1340 n.6 (9th Cir. 1982).

10. The first limitation on section 4 damage actions is drawn from *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Blue Shield*, 102 S. Ct. at 2546. In *Hawaii v.*

Standard Oil the Supreme Court held that section 4 did not authorize a state to sue in its *parens patriae* capacity for damages to its "general economy." 405 U.S. at 264.[8] In *Illinois Brick* the Court held that indirect purchasers in a chain of distribution were precluded from bringing a damage action based on overcharges passed on to them by the direct purchasers of an antitrust violator. 431 U.S. at 746.[9] Those cases recognize that there are certain

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8. *Hawaii v. Standard Oil* was a suit by the State of Hawaii against several producers of petroleum. Hawaii alleged that the producers had entered illegal contracts, conspired to restrain trade, and attempted to monopolize the market. It sought damages in its proprietary capacity for overcharges to the State itself, as *parens patriae* for overcharges to the State's citizens, and as a class representative for all overcharged purchasers in Hawaii. 405 U.S. at 253. The Court held that the injury asserted by Hawaii in its *parens patriae* capacity was not an injury to its "business or property" under §4. 405 U.S. at 264.

9. *Illinois Brick* was an action brought by the State of Illinois against manufacturers and distributors of concrete block in the Greater Chicago area. The concrete block manufacturers sold the blocks to masonary contractors who used them to build masonary structures; those structures were incorporated into entire buildings by general contractors, and the buildings were then sold to the State. The State claimed that the concrete block manufacturers had engaged in a combination and conspiracy to fix the prices of concrete block in violation of §1 of the Sherman Act, 15 U.S.C. §1 (1976). *Illinois Brick*, 431 U.S. at 726-27. The Court held that the State, as an indirect purchaser of the concrete block, was not an "injured person" under §4. *Id.* at 746.

The Court's opinion in *Illinois Brick* was "logically compelled" by its earlier decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 576 (3d Cir. 1979). In *Hanover Shoe* the Court held as a matter of law that an antitrust violator generally could not interpose a defense that a direct purchaser has not been injured because it had passed on an illegal overcharge to its own customers. 392 U.S. 494. *Illinois Brick* involved the offensive use of a pass-on theory by an indirect purchaser against an antitrust violator. Refusing to cut back on its holding in *Hanover Shoe*, the Court held that symmetry required barring the offensive use of

classes of plaintiffs who, although able to trace an injury to an antitrust violation, are generally not within the group of "private attorneys general" Congress created to enforce the antitrust laws under section 4. *Illinois Brick*, 431 U.S. at 746; *Hawaii v. Standard Oil*, 405 U.S. at 262; *see Blue Shield*, 102 S. Ct. 2545-46. The Court in both *Hawaii v. Standard Oil* and *Illinois Brick* relied on two distinct policies to conclude that a section 4 claim was unavailable. First, it "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Blue Shield*, 102 S. Ct. at 2546. Second, it sought "to avoid burdening §4 actions with damages issues giving rise to the need for 'massive evidence and complicated theories,' where the consequences would be to discourage vigorous enforcement of the antitrust laws by private suits." *Id.* at n.11.[10] Applying those policies the Court concluded that it was inconsistent with the broader remedial purposes of the antitrust laws to allow the plaintiffs in either case to maintain a treble damage action.

11. The second limitation on section 4 damage actions identified by the Court is analytically distinct from the issue of what class of persons can sue for treble dam-

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NOTE — *(Continued)*
pass-on by indirect purchasers in the distribution chain. *Id.* at 736; *see Mid-West Paper Products*, 596 F.2d at 576-77.

In *Blue Shield of Virginia v. McCready*, 102 U.S. 2540 (1982), the Court recently reaffirmed the analysis in *Illinois Brick*. *Blue Shield* involved a suit by a Blue Shield subscriber who alleged that Blue Shield's policy of reimbursing subscribers for psychotherapy provided by psychiatrists, but not by psychologists, violated §1 of the Sherman Act. The Court discussed the policies underlying *Illinois Brick* and held that, on the facts presented, the plaintiff was not barred from suit by operation of the *Illinois Brick* rule. 102 S. Ct. at 2546.

10. The Court in *Blue Shield* denoted the problem of disentangling complex damage theories as a "subordinate theme." 102 S. Ct. at 2546 n.11.

ages. It "is the conceptually more difficult question 'of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under §4.'" *Blue Shield*, 102 S. Ct. at 2547 (emphasis in original) (quoting *Illinois Brick*, 431 U.S. at 728 n.7). Through this concept of "antitrust standing," *see Associated General Contractors*, 103 S. Ct. at 907 n.31,[11] the Court has engrafted on section 4 an analysis akin to "proximate cause" to determine whether a particular injury is too far removed from an alleged violation to warrant a section 4 remedy.[12] Because of the infi-

11. Included within the general perimeter of antitrust standing appears to be the idea of "antitrust injury" articulated by Justice Marshall in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *See Associated Gen. Contractors*, 103 S. Ct. at 908-09; *Blue Shield*, 102 S. Ct. at 2550-51. *See generally* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

12. The courts of appeals have formulated a number of tests as aids in determining whether an injured party has sufficient standing under the antitrust laws to recover under §4. Some courts focus on the "directness" of the injury, *e.g.*, *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); on its "foreseeability," *e.g.*, *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); whether the injury "is arguably within the zone of interest protected by the antitrust laws," *e.g.*, *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975); or whether the injured party was within the "target area" of the alleged antitrust conspiracy, *e.g.*, *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983, 449 U.S. 890 (1980); *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Application of those different tests, however, can lead to contradictory results. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 835, 843 (1977); Handler, *The Shift From Substantive to Procedural Innovation in Antitrust Suits*, 71 Colum. L. Rev. 1, 27-31 (1971).

nite variety of claims that arise under the antitrust statutes, however, it has refused to fashion a black-letter rule for determining standing in every case. *Associated General Contractors*, 103 S. Ct. at 907-08 & n.33; *Blue Shield*, 102 S. Ct. at 2547 n.12. Instead each situation must be analyzed on its facts in light of several factors: the causal connection between an antitrust violation and the injured party,[13] the nature of the plaintiff's alleged injury,[14] and the directness or indirectness of the asserted injury.[15] *Associated General Contractors*, 103 S. Ct.

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13. Claims that a defendant specifically intended to harm the plaintiff, however, are not of controlling significance. Although a defendant's improper motive may sometimes support a damages claim under §4, it "is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated Gen. Contractors*, 103 S. Ct. at 908 & nn.25, 26.

14. A claimed injury must be of the type that Congress sought to redress in providing a private damage remedy, and it must flow "from that which makes defendants' acts unlawful." *Blue Shield*, 102 S. Ct. at 2550 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1979)); *see Associated Gen. Contractors*, 103 S. Ct. at 908-09.

15. Note that analyzing the directness or indirectness of the asserted injury for purposes of standing under §4 implicates many of the same concerns identified in *Hawaii v. Standard Oil* and *Illinois Brick*. Those concerns include the existence of a separate class of persons whose self-interest will normally motivate them privately to enforce the antitrust laws through §4, the speculative nature of damages resulting from indirect effects of antitrust violations, the potential for duplicative recovery, and the danger of complex apportionment of damages. *Associated Gen. Contractors*, 103 S. Ct. at 910-12; *see* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term - 1977*, 77 Colum. L. Rev. 979, 994-97 (1977). Thus in *Mid-West Paper Products* we traced the policies of *Illinois Brick* in determining whether a direct purchaser from an antitrust violator's competitors had standing to sue for treble damages allegedly resulting from those purchases. We held that under such an "umbrella" theory the direct purchasers of the defendant's competitor had no standing to sue. 596 F.2d 573, 580-87 & nn.24, 25 (3d Cir. 1979); *cf. In re Coordinated Pretrial Proceeding*, 691 F.2d at 1339-41 & n.6 (*Illinois Brick* and not standing analysis applicable to action brought by indirect purchaser under "umbrella" theory).

at 907-13.[16] The Court's case-by-case approach reflects the fact that "§4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all §4 standing problems." *Bravman v. Bassatt Furniture Industries*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977) (standing determined by "factual matrix"); *see Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 581-82 (3d Cir. 1979); *Cromar Co. v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 508-09 (3d Cir. 1976).

12. The two types of limitations on the section 4 remedy discussed above represent the judiciary's attempts to give shape to the statute's broad mandate in light of congressional intent and statutory policy.[17] They are not hard and fast rules that will dictate the result in every case. Rather they are principles "that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated General Contractors*, 103 S. Ct. at 908. Only by the careful application of those principles to the multitude of claims that potentially are swept within the scope

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16. In *Blue Shield* the Court stated:

> In applying [the] elusive concept [of §4 standing] to this [antitrust] action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under §4.

102 S. Ct. at 2548.

17. While recognizing those two limitations, the Supreme Court was careful to state: "Consistent with the congressional purpose, we have refused to engraft artificial limitations on the §4 remedy. . . . [I]n the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied §4 in accordance with its plain language and its broad remedial and deterrent objectives." *Blue Shield*, 102 S. Ct. at 2545 (footnote omitted).

of section 4 can courts properly effectuate Congress' antitrust policies of deterring antitrust violators and compensating victims of anticompetitive behavior.

III

A

13. In its motion to dismiss before the district court, Caterpillar urged that Appellees were indirect purchasers of Caterpillar's products and thus, under the rule of *Illinois Brick*, were not within the class of persons able to maintain a treble damage action under section 4. Specifically Caterpillar argued that Appellees claims were based on a pass-on theory — *i.e.* that Appellees suffered some form of economic injury only when and if an independent Caterpillar-authorized dealer made a decision to raise his prices in response to the smaller discount given on sales of generator sets to be used outside his service territory. Thus, Caterpillar argued that even assuming Appellees could prove that a "penalty" was passed on to them by OMCO,[18] as indirect purchasers of Caterpillar's products, Appellees are barred from suing Caterpillar by *Illinois Brick*. App. at 88D-89D.

14. In denying Caterpillar's motion, however, the district court based its conclusion that *Illinois Brick* did not act as a bar to Appellees' suit on the analytically distinct issue of whether Appellees had "standing" to maintain an action for damages. The district court assumed that Appellees were the "direct targets" of an unlawful conspiracy and that, as a result of that conspiracy, they were forced out of business. It then concluded that "[i]f it is looked at from that light, . . . clearly [Appellees] would be entitled to recover and would have standing to maintain an action for damages" under *Illinois Brick* and *Blue Shield*. App. at 452I.

18. For the purposes of the instant appeal we must assume that Appellees can prove the facts alleged in their amended complaint. *Associated Gen. Contractors*, 103 S. Ct. at 902.

15. We think that the district court misconstrued the inquiry to be conducted under the rule of *Illinois Brick*. The issue is not whether Appellees have sustained injuries too remote to give them standing or whether they are the direct targets of an alleged conspiracy, but rather whether they are in the class of persons considered to be injured in their business or property under section 4 by an antitrust violation. *Blue Shield*, 102 S. Ct. at 2546-47; *Illinois Brick*, 431 U.S. at 728 n.7. To make the latter inquiry, a district court must focus on the possibility of duplicative recovery and the potential for overly-complex damage claims if a damage suit is allowed. *Blue Shield*, 102 S. Ct. at 2546 & n.11. Although those concerns were mentioned in oral argument at the hearing, *see* app. at 415I-16I, 443I, the district court did not explicitly address either of those two concerns when denying Caterpillar's motion, app. at 450I-53I. We hold that that omission was error. To consider properly the issue raised by Caterpillar's motion the inquiry must be whether, in light of the policies underlying *Illinois Brick*, are Appellees in the group of private attorneys general created by Congress to redress Caterpillar's assumed antitrust violation through use of the treble damage remedy?[19]

B

16. Appellees make two arguments why *Illinois Brick* is not a bar in the instant case. First they assert that it is simply inapplicable to the restraints alleged in their complaint. They argue that the rule of *Illinois Brick* is limited to the facts of that case — a claim of horizontal price fixing brought by indirect purchasers. In

19. We do not suggest that standing issues should have been ignored by the district court, only that they limit the §4 remedy in a different way. For the purposes of this appeal, Caterpillar has conceded that Appellees would have standing if their claims are not barred by *Illinois Brick*. Brief of Appellant at 5 n.4.

support of their very narrow reading of the rule's scope, Appellees seize upon language in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Mid-West Paper Products* was a suit brought by several groups of plaintiffs against manufacturers of consumer bags. In our opinion in that case, we observed that *Illinois Brick* allowed a direct purchaser to sue defendants who had fixed prices above the competitive market price because the benefit derived by the defendants was readily ascertainable. Thus a damage action "would [not] transform [that] antitrust litigation into the sort of complex economic proceeding that the *Illinois Brick* Court was desirous of avoiding if at all possible." 596 F.2d at 585 (footnote omitted). We went on to state in a footnote:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Id. at n.47. Appellees read footnote forty-seven as holding that claims of below-market price fixing, boycotts, vertical restrictions, and monopolization are *per se* outside the purview of *Illinois Brick*. Characterizing their claim as a challenge to Caterpillar's "effort to boycott and to eliminate plaintiffs' class of competitors from competing in the market . . . through the innovative mechanism of a vertically-imposed economic penalty," Brief of Appellees at 25, they conclude that this case is outside the rule of *Illinois Brick*.

17. We disagree. We do not read *Mid-West Paper Products* as holding that claims other than those of above-market horizontal price fixing are always outside the scope of *Illinois Brick*. Instead we read footnote forty-seven as observing that in certain situations the measure of damages for direct purchasers is based upon the injury suffered by the plaintiff, not the benefit obtained by the defendant. When defendants engage in below-market price fixing, group boycotts, vertical restraints, or monopolization, their benefits are sometimes not "readily ascertainable" and thus damages sought by proper plaintiffs must be measured by other means.

18. Our refusal to limit the rule of *Illinios Brick* solely to claims of certain horizontal price restraints is consistent with decisions in this and other courts. In *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), we held that under *Illinois Brick* indirect purchasers could not assert claims for damages under sections *1 and* 2 of the Sherman Act. 637 F.2d at 122; *accord In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1157 (5th Cir. 1979) ("Absent exceptional circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense."), *cert. denied*, 449 U.S. 905 (1980); *cf. Hanover Shoe*, 392 U.S. at 487 (monopolization case). In *Zinser v. Continental Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982), the court relied on *Illinois Brick* to bar indirect sellers from challenging a below-market price fixing scheme. In *Stein v. United Artists Corp.*, 691 F.2d 885, 895 (9th Cir. 1982), the court applied *Illinois Brick* to bar a claim for damages based on an allegation that a defendant had illegally boycotted a corporation of which plaintiffs were creditors and guarantors. All of those cases recognize that the availability of the section 4 remedy depends not on the plaintiff's characterization of the illegal activity but on whether the problems identified in

Illinois Brick would be avoided if relief were allowed. *See Blue Shield*, 102 S. Ct. at 2546 (Court examines underlying policies to determine whether *Illinois Brick* bars damage suit for alleged illegal boycott).[20] Thus the scope

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20. The cases relied on by Appellees, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980), and *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), are inapposite. In *Zenith* plaintiffs claimed that "virtually the entire Japanese consumer electronics product industry," had participated in a massive unitary conspiracy to flood the American market with inexpensive goods with the purpose of destroying the United States domestic consumer electronics product industry. Plaintiffs alleged violations of several statutes, including §§1 and 2 of the Sherman Act. The defendants moved to dismiss under *Illinois Brick*, claiming that Zenith could only prove it was injured by showing that the alleged injury directly inflicted on Zenith's distributors was passed on to Zenith through its distribution chain. In analyzing the motion the district court was careful to point out that Zenith's situation involved two manufacturers competing with each other and not, as in this case, the *Illinois Brick* situation of a seller-purchaser relationship within a single chain of distribution. 494 F. Supp. at 1250, 1252-53, 1256. The court stated, "we perceive the principal teaching of *Mid-West* to be that the applicability of the *Illinois Brick* rule to fact patterns which diverge from the model of a single distribution chain should be determined by assessing, in each factual situation, the weight of the policies articulated by the Supreme Court in *Illinois Brick* and by the Third Circuit in *Mid-West*." *Id.* at 1253. After examining the unique facts of that case in light of those policies, the district court denied the motion. We find *Zenith* completely consistent with our analysis that, in examining *Illinois Brick* problems, courts must evaluate each case in light of the policies underlying the rule.

Nor does *Royal Printing* offer support for Appellees' position. That case involved violations of §1 of the Sherman Act alleged by several small retail businesses against ten of the nation's largest manufacturers of paper products. On a motion to dismiss under *Illinois Brick*, the court held that an indirect purchaser could sue for damages when it had made its purchases from a subsidiary or division of a co-conspirator, even if the pricing decision of such a subsidiary or division was determined by market forces. 621 F.2d at 326-27 & n.4. The court went on to hold that purchases made through independent wholesalers, however, were barred. *Id.* at 327-28. The *Royal Printing* decision parallels the exception to *Illi-*

of *Illinois Brick's* rule barring treble damage actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery and overly-complex damage claims.[21]

19. Appellees' second argument is that even examining their claims in light of the policy concerns of *Illinois Brick*, they should not be barred from seeking treble damages. Appellees do not contend that they fall within any of the recognized exceptions to the *Illinois Brick* rule.[22] Instead they rely on an affidavit executed by

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nois Brick that we recognized in *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1979). In that case we held that an antitrust violator cannot evade liability "by the simple expedient of inserting a subsidiary between the violator and the first uncontrolled purchaser." *Id.* at 19. While our view of the exception is somewhat narrower than that of the Ninth Circuit, *see Mid-West Paper Prods.*, 596 F.2d at 589 (violator must dominate subsidiary's prices in accordance with the general price fixing conspiracy), the exception in any form is inapplicable to this case. In its complaint Appellees admit that OMCO, the direct purchaser in this case, is not a subsidiary of Caterpillar but rather an independent dealer. Complaint at ¶¶8, 13; app. at 9B, 11B. Thus under either *Royal Printing* or *Mid-West Paper Prods.*, Appellees would be barred by the rule of *Illinois Brick*.

21. Another difficulty with Appellees' argument is their *post hoc* characterization of Caterpillar's activity as a "boycott." Appellees' complaint does not allege that anyone ever refused to sell them generator sets, only that the sets cost more because of the service fee imposed by Caterpillar on OMCO. The primary act they challenge is the imposition of an unlawful penalty on Caterpillar's dealers, a claim very similar to the overcharges involved in *Illinois Brick*. Complaint ¶22, app. at 18B-19B; *cf. Jewish Hosp. Ass'n v. Stewart Mechanical Enters., Inc.*, 628 F.2d 971, 977 (6th Cir. 1980) (court rejects belated attempt to recharacterize claim made in complaint so as to avoid *Illinois Brick*), *cert. denied*, 450 U.S. 966 (1981).

22. The Supreme Court noted two exceptions in *Illinois Brick*. Where there exists a fixed quantity, cost-plus contract between the direct purchaser and its customer or where the direct purchaser is owned or controlled by its customer the indirect purchaser would not be barred by the rule of *Illinois Brick*. 431 U.S. at 735-36 &

OMCO's president and offered by Caterpillar in support of its motion to dismiss. That affidavit states in pertinent part:

> Neither the existence of the 5% [service fee] nor any changes in Caterpillar's administration thereof, including the 1978 or 1980 changes, has had any apparent effect on Ohio Machinery's incentive or ability to sell Caterpillar electric generators sets outside its service territory generally or in Saudi Arabia specifically.

App. at 110E. Appellees contend that OMCO's affidavit "denies absolutely that OMCO suffered any damage from Caterpillar's warranty fee system. OMCO has thereby vitiated any opportunity it might have had to sue successfully for damages as a result of the same purchases which are the subject of the present action." Brief of Appellees at 34. Appellees argue that the possibility of duplicative damages is thus avoided.

20. First, Appellees make no claim in their *complaint* that OMCO would not sue in the instant case. Appellees allege that Caterpillar and its co-conspirators have imposed an unlawful penalty upon OMCO which has prevented OMCO from distributing generator sets in territories and to customers of its own choosing. Without

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NOTE — *(Continued)*

n.16. We relied on the latter in holding that in certain circumstances, an indirect purchaser could sue when it had purchased goods from the subsidiary of an antitrust violator. *Mid-West Paper Prods.*, 596 F.2d at 577 n.8, 589; *In re Sugar Indus. Antitrust Litig.*, 579 F.2d at 18-19; *see* note 22 *supra*. Some lower courts have recognized a third "vertical-conspiracy exception" to *Illinois Brick*. *See, e.g., Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *In re Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1294-96 (D. Md. 1981). Because Appellees disavow any reliance on such an "exception," Brief of Appellees at 36 n.26, we do not have to decide whether we would recognize its existence. *See In re Coordinated Pretrial Proceedings*, 691 F.2d at 1341 n.9.

deciding the issue, we note that it is possible that OMCO could make out a cause of action under the antitrust laws on those facts. *See Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980). Second, it is not clear to us that OMCO's affidavit precludes it from suing Caterpillar. The fact that Caterpillar's service fee did not affect OMCO's ability to sell generator sets does not necessarily mean OMCO was not damaged by Caterpillar's policy. It could merely reflect that demand for the sets in Saudia Arabia was relatively inelastic with respect to price. OMCO could still claim that its profit margin was less due to imposition of the fee. Third, the Supreme Court recognized in *Illinois Brick* that it was possible that direct purchasers might not sue their suppliers in all cases. "But on balance . . . we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under §4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." 431 U.S. at 746. We do not know if, in fact, OMCO is going to sue Caterpillar. If it does, however, it would be claiming treble damages for injuries arising from the very same transactions involved in this case. Thus the risk of duplicative recovery is clearly present in this case, a danger the Court sought to avoid through application of the *Illinois Brick* rule.[23]

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23. Before the district court Appellees suggested that the danger of duplicative recovery was not present in this case because they were suing not to recover the fee imposed by Caterpillar, but to recover the separate damages of Appellees' lost business and profits resulting from application of that fee to OMCO. App. at 438I-39I. Appellees admitted, however, that the issues were intertwined and that the damage calculation would concentrate on the increased amount OMCO had to pay for the sets. App. at 440I. Furthermore, by arguing that their damages are their lost profits *resulting* from Caterpillar's imposing the service fee on OMCO, Appellees implicate the second concern of *Illinois Brick*, that of overly complex and speculative damage theories. *See also* app. at 414I-15I.

21. Appellees also contend that their damage claim does not present a problem of "massive evidence and complicated theories." *Illinois Brick*, 431 U.S. at 741 (quoting *Hanover Shoe*, 392 U.S. at 493). To prove any damages, however, Appellees would have to calculate the service fee on each generator set purchased by OMCO, determine how the imposition of the fee and market forces affected the price paid by Appellees,[24] and finally estimate how any increased price affected Appellees' profits and sales in light of competitive market forces in Saudi Arabia. That type of calculation was the very analysis the Supreme Court sought to avoid in *Illinois Brick*, 431 U.S. at 741-43. We recognize that damage analysis in antitrust actions is often difficult and complex. The instant case, however, presents damage issues which are sufficiently uncertain so as to impair the effectiveness of the section 4 remedy.

IV

22. We hold that, based on facts alleged in their complaint, Appellees are barred from seeking treble damages under section 4 of the Clayton Act by operation of the rule of *Illinois Brick*. The possibility of duplicative recovery if the direct purchaser brings suit and the potential for complex apportionment of damages lead us to conclude that Appellees are not persons injured in their business or property by reason of a violation of the antitrust laws within the meaning of section 4. Our anal-

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24. In the affidavit relied on by Appellees, OMCO's president stated:

> In its dealings with Merican companies with respect to Caterpillar gensets and related products, Ohio Machinery negotiated with the Merican companies on an individual transaction by transaction basis. The price, delivery, and other terms varied from transaction to transaction, depending upon a myriad of considerations.

App. at 111E.

ysis is tempered by our recognition that the antitrust laws are written broadly to ensure rigorous enforcement of congressional policy. On the facts of this case, however, we find that the policies underlying *Illinois Brick* preclude Appellees from maintaining suit.

23. We will reverse the district court's order of July 2, 1982, as amended on August 16, 1982, and we will remand the case for further proceedings consistent with this opinion.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

I agree with the majority's conclusion that in focusing only on plaintiffs' standing to sue, the district court failed properly to determine whether, under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the potential for double recovery and excessive complexity bars plaintiffs from recovering treble damages under §4 of the Clayton Act. I also agree that *Illinois Brick* cannot be mechanically applied so that an antitrust plaintiff's ability to recover turns upon the affixing of handy labels to the nature of the wrong alleged or to the plaintiff's position in the marketing hierarchy. The majority and I differ, however, on whether the policies underlying §4 and *Illinois Brick* would be advanced by denying plaintiffs the opportunity to continue with this action. In my view, the prosecution of this suit would be both consistent with *Illinois Brick* and necessary to avoid immunizing the anti-competitive tactic that plaintiffs allege. Moreover, this court's discussion of the sweep of *Illinois Brick* in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), supports my conclusion that plaintiffs' injuries are not of the kind contemplated by the *Illinois Brick* Court.

I begin with the Supreme Court's recent decision in *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (U.S. June 21, 1982). There, in the course of determining that the plaintiff-patient had standing to sue the insurer selected by her employer, the Court demonstrated its reluctance to allow alleged anti-competitive conduct to go unchallenged merely for want of a direct relationship between plaintiff and defendant. In discussing *Illinois Brick*, the *Blue Shield* Court noted:

> If there is a subordinate theme to our opinions in [*Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972)] and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under §4. *Where consistent with the broader remedial purposes of the antitrust laws*, we have sought to avoid burdening §4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," *where the consequence would be to discourage vigorous enforcement* of the antitrust laws by private suits.

50 U.S.L.W. at 4725 n.11 (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 393 U.S. 481, 493 (1968)) (emphasis added). Thus, we should be mindful not only of the twin concerns behind the *Illinois Brick* rule, but also of the overarching policy favoring "compensating victims of antitrust violations for their injuries and deterring violators by depriving them threefold of 'the fruits of their illegality,' while at the same time furthering the overriding goal of the antitrust laws — preserving competition." *Mid-West Paper Products*, 596 F.2d at 583 (footnotes omitted).

Illinois Brick concerned horizontal price-fixing above market price; here, however, plaintiffs alleged the existence of a vertical price-fixing conspiracy. Although the majority correctly determines that mere nomencla-

ture cannot magically obviate consideration of the *Illinois Brick* issue, the differences between the injuries alleged here and those contemplated in *Illinois Brick*, require us to ask whether the goals of avoiding duplicative recovery and excessive complexity would be advanced by barring this suit.

This court observed in *Mid-West Paper Products* that "when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge." *Id.* at 585 (footnote omitted). In the classic *Illinois Brick* circumstance, the price-fixer's benefit is commensurate with the purchasers' injury. Thus, if both direct purchaser and indirect purchaser seek recovery of the amount of the overcharge, duplicative recovery is likely. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1246, 1255 (E.D.Pa. 1980) (Becker, J.) (discussing *Mid-West Paper Products*). The same is not necessarily true, however, where the wrong alleged differs from the kind of anti-competitive act that was the focus of *Illinois Brick*:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Mid-West Paper Products, 596 F.2d at 585 n.47 (quoting *Cromar Co. v. Nuclear Materials and Equipment*

Corp., 543 F.2d 501, 505 (3d Cir. 1976)). The majority, apparently focusing on the second quoted sentence, reads this discussion in *Mid-West Paper Products* as dealing only with the appropriate measure of damages. *See* majority opinion, typescript at 21. I disagree. I think it is clear from the context of footnote 47 and from its emphasis on compensating the antitrust plaintiff that where an indirect purchaser has suffered injury other than incurring the cost of the passed-on overcharge, neither the policy of compensating injury nor that of deterring anti-competitive conduct can be realized unless the indirect purchaser can bring action against the seller. In the instant case, for example, plaintiffs alleged loss of sales and profits, reduction in the value of goodwill, and destruction of a significant portion of their businesses. Complaint at 14, *reprinted in* app. at 20B. Many of these alleged injuries are unique to the plaintiffs, and their complaint comprises more damage than the intermediary Ohio Machinery Company could recover were it to bring its own action. By putting treble damages outside of plaintiffs' reach, the majority effectively places complete recovery outside of anyone's reach. Under the majority's approach, plaintiffs cannot be made whole — notwithstanding the impossibility of duplicative recovery — and defendants cannot be made to give up the fruits of an alleged illegality.

Turning to the desire to avoid complexity, I consider it in its larger context. I do not read *Illinois Brick* to be concerned with protecting the courts from abstract economic theorizing so much as promoting vigorous policing of the marketplace. The *Illinois Brick* Court feared that tracing and allocating overcharges would seriously undermine the enforcement effectiveness of the treble damages action. 431 U.S. at 737, 745-47. What I stated before in the context of antitrust standing bears equally on the issue now before us:

> The Court in *Illinois Brick* was concerned with allowing the injection of complex issues into antitrust

> actions because the injection of such complexity would increase the cost of litigation and thereby discourage the enforcement of the antitrust laws. . . .
>
> . . . Where added complexity does not result in a disincentive to the enforcement of the antitrust laws, its potency as an argument against standing is seriously diminished.

Mid-West Paper Products, 596 F.2d at 599 (Higginbotham, J., dissenting). Likewise, allowing the instant suit to go forward is necessary to the attainment of the goal of deterrence. The anti-competitive conduct plaintiffs complain of cannot otherwise be policed. This is not a case where passed-on overcharges are so splintered that no indirect purchaser will be interested in pursuing relief; here, plaintiffs allege predatory destruction of their business — a complaint which only they may bring.

Nor do I believe that *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), compels a different result. The abbreviated, one-paragraph discussion of the *Illinois Brick* issue in that case includes no statement of rationale and no examination of the policies that underlie §4 and *Illinois Brick*. To the extent that it can be read to bar relief to any plaintiff who falls into the category of "indirect purchaser," I do not believe that *Sweeney* survives the Supreme Court's decision in *Blue Shield*.

I would affirm the district court's denial of defendant's motion to dismiss.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

THE COURT: All right, thank you very much. The defendant Caterpillar Tractor Company has filed a motion to dismiss and/or for summary judgment, based first on, primarily I believe on the fact that the claim of plaintiff in this case is that of an indirect purchaser and that therefore would be precluded from bringing an action for damages under Section IV under the doctrine of Illinois Brick Company versus Illinois 431 U.S. 720.

The basic contention of this case as I understand it is that a Saudi Arabian Corporation and a manufacturer, Caterpillar Tractor, conspired to inaugurate a warranty fee arrangement, the effect of which would require a dealer who sold a generator, electric genset that would eventually be used out of that dealer's territory, would require the dealer to pay a warranty fee of 5 percent, which would not be refunded to the dealer irrespective of whether or not any claim was made under the warranty agreement.

The intention being that this interfered with the rights of an independent dealer such as plaintiff from purchasing through an authorized dealer at a lower price, and thereby being able to compete in other territories.

The contention that the plaintiff is a second purchaser, as it were or not the direct purchaser from the Caterpillar Tractor Company, and therefore is precluded under the doctrine of Illinois Brick, it seems to me it would not be applicable in this case, particularly in view of the very recent decision of the U.S. Supreme Court in Blue Shield of Virginia versus McCready, which was just decided on June 21, 1982.

I have studied the Blue Shield case as carefully as I can and I must confess that I have a great deal of difficulty in understanding or at least forecasting the full effect of that opinion.

I think that it is rather clear, however, from Blue Shield of Virginia that the Supreme Court is suggesting that it is improper to just mechanically apply the Illinois Brick doctrine and thereby exclude in every case anybody who is not a direct purchaser from the original seller or the manufacturer.

I see no other reason for the Blue Shield case and the opinions or the opinion which it developed other than to make it clear that the Illinois Brick case should not be given a very wide or broad interpretation as some of the lower Courts may have been doing.

I also think that this Circuit in Mid-West Paper Products versus Continental Group, Inc., 596 F.2d 573 (1979) in an opinion by Judge Adams to some extent forecasts, foreshadowed the view of the Supreme Court, in Blue Shield of Virginia in which it suggested that the cases must be analyzed analytically to determine whether or not there is a possible violation of the antitrust laws, and whether or not the plaintiff, the party seeking recovery, comes within the protection of the antitrust laws, so as to permit it to seek damages.

In this particular case plaintiffs' contention is that the plaintiff itself was a direct target of an unlawful conspiracy and that as a result of that conspiracy it was forced out of business.

It is true that in carrying out that conspiracy in effect it was aimed in such a way that prices that the plaintiff would have to pay for the products were increased, but as I understand it, the injury is not the increased price itself, but simply that the increased price is what brought about injury such as forcing plaintiffs out of business and lost profits.

It would seem to me that the antitrust laws are, among other things, very definitely for the purpose of protecting businesses from being the target of a conspiracy to drive them out of business. If it is looked at from that light, then clearly they would be entitled to recover and would have standing to maintain an action for damages.

There has also been certain contentions of lack of jurisdiction because of it not showing a sufficient effect on international commerce, and it seems to me under all of the contentions of the plaintiff in this case, that clearly there would be jurisdiction in this Court.

As I say I am not sure of the extent or the proper interpretation of Blue Shield but as I read it, it would appear to me that this type of activity which is alleged in the complaint is such that would permit plaintiff to maintain its action for damages.

Therefore, the motion to dismiss and the motion for summary judgment on behalf of defendant will be denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERICAN, INC., et al	*	CIVIL ACTION
v.	*	
CATERPILLAR TRACTOR CO.	*	NO. 80-3723

AMENDED ORDER

It is ordered that the order entered in open court at the conclusion of oral argument on July 2, 1982, denying defendant's motion to dismiss and/or for summary judgment for the reasons stated in open court, is hereby amended to be as follows:

It is ordered that the motion of the defendant, Caterpillar Tractor Co., to dismiss the complaint or, in the alternative, for summary judgment in favor of the defendant is denied.

The undersigned district judge hereby states and certifies that in his opinion this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may and will materially advance the ultimate termination of the litigation. The said controlling question of law is as follows:

> When an alleged conspiracy between an electrical generator manufacturer and one of its authorized foreign dealers is formed to hinder and/or exclude intra-brand competition in the foreign market by an independent, non-factory authorized dealer who purchases from other authorized dealers for resale in the foreign market, whereby the manufacturer imposes a non-refundable "5% warranty service fee" on all sales by authorized dealers when the generators are to be installed for initial use outside of the authorized selling dealer's assigned geographical service territory, is the "target-victim" of the conspiracy (the independent non-factory authorized dealer) precluded from maintaining a private damage action against the manufacturer under Section 4 of the Clayton Act (15 U.S.C. §15) by operation of the rule of Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)?

It is therefore further ordered that the foregoing question be certified for interlocutory appeal, pursuant to 28 U.S.C. §1292(b), to the United States Court of Appeals for the Third Circuit.

BY THE COURT

Donald W. VanArtsdalen

August 16, 1982.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1577

MERICAN, INC. and MERICAN

CURTIS, INC. and MERICAN

CURTIS, LTD.

vs.

CATERPILLAR TRACTOR CO.

(D.C. Civil No. 80-3723)

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE EASTERN

DISTRICT OF PENNSYLVANIA

Present: HUNTER and HIGGINBOTHAM,

Circuit Judges; and

GERRY, District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 12, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the

order of the said District Court, filed July 2, 1982 and entered July 6, 1982, as amended by order entered August 16, 1982, be, and the same is hereby reversed and the cause remanded to the said district court for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

Sally Mrvos
Clerk

July 26, 1983

*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1577

MERICAN, INC.; MERICAN CURTIS, INC.; and

MERICAN CURTIS, LTD.,

Plaintiffs/Appellees

v.

CATERPILLAR TRACTOR CO.,

Defendant/Appellant

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, ALDISERT,

ADAMS, GIBBONS, HUNTER, WEIS, GARTH,

HIGGINBOTHAM, SLOVITER, BECKER,

Circuit Judges

The petition for rehearing filed by

PLAINTIFFS-APPELLEES

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, Higginbotham, Sloviter and Becker would grant the petition for rehearing.

By the Court,

James Hunter
Judge

Date Sep 9 1983

APPENDIX F

STATUTES INVOLVED

Sherman Act, Section 1, 15 U.S.C. 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal . . .

Clayton Act, Section 4, 15 U.S.C. §15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.